

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SANTANNA NATURAL GAS CORPORATION)	
d/b/a Santanna Energy Services)	
)	
)	Docket No. 02-0441
Application for Certificate of Service Authority)	
Under §19-110 of the Public Utilities Act,)	

SANTANNA NATURAL GAS CORPORATION’S BRIEF
IN SUPPORT OF ITS APPLICATION FOR CERTIFICATION PURSUANT
TO THE ALTERNATIVE GAS SUPPLIER LAW, 220 ILCS 5/19-100, ET SEQ.

Santanna Natural Gas Corporation (“Santanna”), by one of its attorneys, Karl G. Leinberger of Crowley Barrett & Karaba, Ltd., pursuant to Ill. Admin. Code Tit. 83, Section 200.800, submits the following brief in support of its application for certification pursuant to the Alternative Gas Supplier Law (“AGSL”), 220 ILCS 5/19-100, *et seq.*

Introduction

Santanna has met each requirement that the AGSL sets out for certification as an alternative gas supplier. Santanna has demonstrated its compliance with the financial, technical, managerial and other requirements. Therefore, the Commission should issue Santanna a certificate of service authority.

The AGSL does not set a standard of perfection, and it does not require putative alternative gas suppliers to have met its requirements during the first 179 days after its enactment. The AGSL reflects an appreciation of the real-world complexities associated with opening up a previously-monopolized residential natural gas market to competition among companies that have never previously provided services to that market. See Transcript of Hearing (“Tr.”), p. 73 (testimony of T. Wayne Gatlin (“Gatlin”)).

In this vein, the AGSL set forth a 180-day grace period for these newcomers to comply with its standard. As it relates to Santanna, the grace period has worked exactly as designed. Santanna is the first to admit that its residential natural gas program has been short of perfect since its inception, but also true is the fact that Santanna has developed and refined its operations, which exceed the AGSL requirements. Unquestionably, Santanna has demonstrated a willingness to adapt to constructive input from any source, starting with its customers, to improve its natural gas service. Most assuredly, Santanna met the 180-day deadline to show compliance with the AGSL.

The Citizen's Utility Board ("CUB") and the Attorney General (collectively, "Opposing Parties")¹ criticized Santanna marketing materials that were superseded by revised marketing materials well before August 9, 2002. They contend that Santanna's prior growing pains are a clear indicator that Santanna cannot qualify as an alternative gas supplier. This focus on superseded materials is misplaced under both the AGSL and a common sense assessment of Santanna's operations. While ignoring the existence of the 180-day provision, the Opposing Parties contend that Santanna should be denied a certificate because Santanna's difficulties should be given disproportionate weight over its improvements.

The Opposing Parties' argument misses the mark. The AGSL directs the Commission to grant or deny certification based on whether Santanna met the AGSL requirements within the 180-day grace period. The Commission must reject the Opposing Parties' improper attempt to read a much shorter grace period into the AGSL.

¹ The Attorney General's witness, Patrick Hurley ("Hurley"), did not take a position on whether Santanna should be certified, but the Attorney General's demeanor in this proceeding and considering his separate lawsuit, pending as case no. 02 CH 12208, which seeks to shut down Santanna altogether, place the Attorney General squarely in the opposition camp. Staff has not taken a formal position in favor of or against Santanna's certification. Tr. at 522 (testimony of Staff witness Joan Howard ("Howard")).

Santanna is focused on serving only Illinois natural gas customers. Rebuttal Testimony of T. Wayne Gatlin (“Gatlin Rebuttal”), pp. 3, 5-6. While many natural gas providers have come and gone, Santanna has a 14-year history of providing natural gas to Illinois commercial and industrial customers and continuously developing its natural gas business. *Id.* at 2-3, 5, 6; Tr. at 61-62, 120-21 (Gatlin). That lengthy history guides Santanna’s residential service, including its ability to address unforeseen issues. Gatlin Rebuttal, pp. 5-6.

In the evolution of its residential gas business, Santanna solicited feedback from Nicor, Peoples and the Attorney General on how to improve its marketing materials. Gatlin Rebuttal, p. 11. It made revisions to its welcome letter and marketing and verification scripts. *Id.* at 10-11, Exs. 1.03, 1.04, 1.05 and 1.08 – 1.12. Santanna sent out a follow-up letter to provide additional information about the nature of its storage program. *Id.*, Ex. 1.18. All of these revisions were made for the purpose of providing even greater information about its services, particularly the storage aspect. *Id.* at 10-12. Santanna increased the number of customer service phone lines from 12 to 32 during the 180-day grace period. *Id.* at 30. It installed a call-answering system, shifted and hired additional personnel to answer and return customer calls, expanded its customer service hours and had both toll-free and local telephone numbers. *Id.* at 6-7, 29-30. Santanna provided additional marketing material to its marketers and imposed greater restrictions on those marketers. *Id.* at 6-7. Santanna even temporarily suspended its marketing program in order to focus its attention and resources on resolving extant customer issues. Tr. at 200-01 (Gatlin); Gatlin Rebuttal, p. 7.

Undoubtedly, Santanna’s residential operations were not perfect and may never be, but they do qualify for certification, and Santanna has demonstrated a clear willingness to continue the evolution of its operations to address any arising difficulties or concerns.

Argument

I. SANTANNA HAS SATISFIED ALL OF THE AGSL REQUIREMENTS.

A. The AGSL Gave Santanna 180 Days, Until August 9, 2002, To Comply With Its Requirements.

The AGSL states, in relevant part, as follows:

A person, corporation or other entity acting as an alternative gas supplier on the effective date of this amendatory Act of the 92nd General Assembly **shall have 180 days from the effective date of this amendatory Act** of the 92nd General Assembly **to comply with the requirements of this Section** in order to continue to operate as an alternative gas supplier.

220 ILCS 5/19-110(b) (emphasis added). “The cardinal rule of statutory construction is to ascertain and give effect to the true intent of the legislature....” *In re D.D.*, 196 Ill. 2d 405, 418, 752 N.E.2d 1112 (2001). “When determining legislative intent, the starting point always is the language of the statute, which is the most reliable indicator of the legislature’s objectives in enacting the particular law.” *Id.* at 419. Where “the language of a statute is plain and unambiguous, courts may not read in exceptions, limitations, or other conditions.” *Ibid.* Further, courts must “construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous.” *AP. Properties, Inc. v. Goshinsky*, 186 Ill. 2d 524, 533, 714 N.E.2d 519 (1999).

Giving meaning to each word in the 180-day clause and not reading in any exceptions, limitations or conditions, the plain language of the AGSL gives Santanna an entire 180 days to demonstrate compliance. The Opposing Parties focused their efforts on Santanna’s initial marketing efforts, which occurred in the Spring of 2002 (Gatlin Rebuttal, pp. 7, 14), but ignored Santanna’s materials and conduct in place by the end of the 180-day grace period. In effect, the Opposing Parties seek to impose a mere 60 or 90-day grace period, which is arbitrary and in direct contravention to the AGSL.

The purpose of this 180-day grace period is to allow companies like Santanna time to work out any initial issues in their services so that residential customers are assured of receiving natural gas only from qualified providers. Indeed, Santanna experienced initial difficulties, but then addressed and corrected them timely and well within the 180-day grace period expressly granted by the AGSL.

B. Santanna Satisfied All Certification Requirements Of The AGSL.

The AGSL requires that Santanna meet the following requirements:

1. Submit a verified application for a certificate of service authority (“certificate”) showing that it meets the AGSL requirements (220 ILCS 5/19-110(c));²
2. Publish notice of its application in the official State newspaper within 10 days of filing the verified application (220 ILCS 5/19-110(c));³
3. Submit an application identifying the areas in which it intends to provide natural gas service (220 ILCS 5/19-110(d));⁴
4. Certify that it will “comply with all applicable federal, State, regional, and industry rules, policies, practices, and procedures for the use, operation, and maintenance of the safety, integrity, and reliability of the gas transmission system” (220 ILCS 5/19-110(e)(2); 83 Ill. Adm. Code §551.20(a) (Requirements for Applicants under Section 19-110(e) of the [AGSL]));⁵
5. “[A]gree to submit good faith schedules of natural gas deliveries in accordance with applicable tariffs” (83 Ill. Adm. Code §551.20(a));⁶
6. Certify that it will “comply with such informational or reporting requirements as the Commission may by rule establish” (220 ILCS 5/19-110(e)(3); 83 Ill. Adm. Code §551.20(c));⁷
7. Certify that it will “comply with all other applicable laws and rules” (220 ILCS 5/19-110(e)(5)) and Commission rules and orders ” (83 Ill. Adm. Code §551.20(d));⁸
8. Certify that it will “provide service to residential customers that are eligible to take service from an AGS” (83 Ill. Adm. Code §551.20(b));⁹

² Santanna met this requirement when it filed a verified Application on June 27, 2002, as amended on July 12, 2002 and July 17, 2002. This is uncontested.

³ Santanna met this requirement when it placed a notice of its application in an official State newspaper on June 28, 2002. See Amended Application filed July 12, 2002, ¶1 and Ex. A thereto. This is uncontested.

⁴ Santanna met this requirement by identifying the areas served by Nicor Gas Company, The Peoples Gas, Light and Coke Company, and North Shore Gas Company. See Application, ¶8; Amended Application filed July 12, 2002, ¶2. This is uncontested.

⁵ Santanna met this requirement. See Application, ¶5a). This is uncontested.

⁶ Santanna met this requirement. See Application, ¶6. This is uncontested.

⁷ Santanna met this requirement. See Application, ¶5c). This is uncontested.

⁸ Santanna met this requirement. See Application, ¶5d). This is uncontested.

⁹ Santanna met this requirement. See Application, ¶5b). This is uncontested.

9. Certify that it will meet the provisions of 220 ILCS 5/19-115 (220 ILCS 5/19-110(e)(4); 83 Ill. Adm. Code §551.30(d)(2));¹⁰
10. Submits a Permit Bond (83 Ill. Adm. Code §551.50(a));¹¹ and
11. Show that it possesses “sufficient technical,¹² financial,¹³ and managerial resources¹⁴ and abilities to provide the service for which it seeks a certificate of service authority” (220 ILCS 5/19-110(e)(1); 83 Ill. Adm. Code §§551.80(a), 551.90(b), 551.100).

As indicated in the footnotes to the foregoing list, Santanna has demonstrated compliance with each of the foregoing requirements in its submissions to the Commission. In fact, each requirement was uncontested as written in the AGSL and the Administrative Code. At best, other parties have questioned Santanna’s managerial abilities and its willingness to comply with applicable laws.¹⁵ As set forth *infra*, neither challenge has merit.

C. Santanna Has Demonstrated Compliance With The Managerial Requirements To The Letter Of The Law.

The managerial resources requirement is not at issue here by virtue of contentions made by the Opposing Parties that Santanna made some inappropriate management decisions in the early stages of its residential gas program. The Commission’s promulgations do not call for inquiry into whether all of management’s decisions are ideal. The relevant Illinois Administrative Code provides that

An applicant **shall** be deemed to possess sufficient managerial capabilities to serve residential customers if it has two or more individuals in management positions with four or more years demonstrated experience in a management position with enterprise financial and administration responsibilities including profit and loss responsibilities and four years natural gas sales experience, and provides the information required in subsections (a) and (b) of this Section.

¹⁰ Santanna met this requirement. *See Application*, ¶11. This is uncontested.

¹¹ Santanna met this requirement. *See Amended Application* filed July 17, 2002, ¶4 and Ex. thereto. This is uncontested.

¹² Santanna met this requirement. *See Application*, ¶20 and Ex. F thereto; *Amended Application* filed July 12, 2002, ¶¶6-7 and Ex. F thereto. This is uncontested.

¹³ Santanna met this requirement. *See Application*, ¶¶18-19 and Ex. E thereto. This is uncontested.

¹⁴ As set forth in Section I.C, *infra*, Santanna met this requirement and it is uncontested as written.

¹⁵ *See e.g.*, Kolata Direct, p. 4.

a) The applicant shall include in its application an exhibit containing occupational background information on the persons who are being used to meet the requirements of this Section.

b) The applicant shall include in its application an exhibit containing a corporate organizational chart and indicating the position of persons indicated in subsection (a) of this Section.

83 Ill. Adm. Code §551.100 (emphasis added). This text creates three requirements for Santanna: (1) it must have in its management at least two people with at least four years of management experience that includes financial and administrative duties, including profit and loss responsibilities and natural gas sales experience; (2) it must submit an exhibit containing the work backgrounds for the persons used to satisfy the first requirement; and (3) it must submit an exhibit containing the organizational chart for Santanna's management, including the positions of the persons used to satisfy the first requirement. If these three requirements are met, the Commission shall deem Santanna's managerial resources sufficient. *Id.*

Santanna has satisfied all three requirements. *First*, Santanna demonstrated that Gatlin, its President and CEO, and Doug Cueller ("Cueller"), its Vice-President of Midwest Operations, have a combined 26 years of experience in the natural gas business in management positions with enterprise financial and administrative responsibilities, including profit and loss responsibilities, in the natural gas industry.¹⁶ *See Application*, ¶¶21 and Ex. G thereto; *Amended Application* filed July 12, 2002, ¶¶8-9 and Ex. G thereto; Gatlin Rebuttal, pp. 3, 5. Gatlin and Cueller also have a combined 25 years of natural gas sales experience. *Id.* This is uncontested.

Second, Santanna submitted documents showing the work backgrounds for Gatlin and Cueller. *See Application*, Ex. G; *Amended Application* filed July 12, 2002, Ex. G thereto. This is uncontested.

¹⁶ Gatlin has 15 years of experience in the natural gas industry and 30 years of total business experience, while Cueller, whose initial experience was with NICOR, has 12 years of natural gas industry experience and 17 years of total business experience. *See Application*, Ex. G.

Third, Santanna submitted its organizational chart showing, *inter alia*, Gatlin as the CEO and Cueller as the Vice-President of Midwest Operations. See Application, Ex. H. This is uncontested.

Because Santanna submitted adequate proof that it meets the managerial resources requirements, and no evidence was even presented to rebut Santanna's proof, the Commission shall find that Santanna satisfied the managerial resources requirement. 83 Ill. Adm. Code §551.100.

D. Santanna Has Demonstrated Its Willingness To Comply With Applicable Laws.

In the simplest terms, Santanna has met this requirement by its certification that it will comply with all applicable laws. See Application, ¶5d). The Opposing Parties again seek to impose upon Santanna additional burdens that simply are not present in the AGSL. Most importantly, however, the Opposing Parties focus exclusively on a backlash experienced by Santanna related to short-lived marketing efforts¹⁷ and exacerbated by the Opposing Parties themselves¹⁸ and parlay that into an alleged pattern of misconduct by Santanna.

The Opposing Parties unjustly gloss over the great strides made by Santanna since the commencement of its residential gas business. Indeed, when pressed to identify any deficiencies in Santanna's marketing materials in use subsequent to June 2002, the Opposing Parties' witnesses wholly failed to do so. Specifics of Santanna's materials and related challenges are

¹⁷ The most prominent complaint regarding Santanna was its alleged failure to disclose the storage component of its program. As set forth more fully *infra*, Santanna did disclose this aspect of its program. Nonetheless, it specifically incorporated it into its marketing scripts on June 17, 2002 and further expanded the text on July 9, 2002. See Gatlin Rebuttal, Exs. 1.08 and 1.09, respectively. Indeed, CUB failed to identify a single complaint relating to marketing materials that post-dated June 17, 2002. Kolata Direct, pp. 4-15; Kolata Supplemental Direct, pp. 1-7; Tr. at 318-434 (Kolata).

¹⁸ Gatlin Rebuttal, p. 21.

addressed more fully *infra* for completeness, but the truly relevant inquiry here is whether Santanna has certified its willingness to comply with all applicable laws, which it has.

II. SANTANNA'S MARKETING AND BILLING PRACTICES COMPLY WITH APPLICABLE LAWS.

The crux of the Opposing Parties' opposition to Santanna's certification appears to center on whether (a) Santanna's marketing materials fail adequately to disclose the prices, terms and conditions of Santanna's residential natural gas program; (b) Santanna inadequately supervised its marketers; (c) Santanna engages in a practice of slamming; (d) Santanna's billing statements are inadequate; and (e) Santanna's customer service is deficient. Although Santanna and its marketers have been imperfect, the Opposing Parties' alleged bases to oppose Santanna's certification do not adequately overcome Santanna's proof of compliance.

A. Santanna's Marketing Materials Adequately Disclose The Prices, Terms And Conditions Of Its Services.

Santanna's most recent marketing materials in place by August 9, 2002 adequately disclose Santanna's prices, terms and conditions, as required by the AGSL. Gatlin Rebuttal, Exs. 1.03, 1.04, 1.12, 1.14 and 1.18. The Opposing Parties ignored these materials and their disclosure of Santanna's prices, terms and conditions. Furthermore, the Opposing Parties presented no evidence showing that Santanna's current materials were the cause of any consumer complaints. Tr. at 414-17 (testimony of Kolata) and 486 (testimony of Hurley). Indeed, the predecessors to Santanna's most recent marketing materials were substantially similar and also adequately conveyed Santanna's prices, terms and conditions. See Gatlin Rebuttal, Exs. 1.08, 1.09, 1.10 and 1.11.¹⁹

¹⁹ The Opposing Parties were left to rely on long-outdated marketing materials in their attempt to demonstrate Santanna's noncompliance. See e.g., Tr. at 138-40, 145-51 (Gatlin). Even those materials were not as deficient as the Opposing Parties indicate. Even perfect intentions do not necessarily lead to perfect results. As Staff witness

No party presented credible evidence that Santanna's current materials were inadequate. In fact, the only witness even to claim inadequacy was CUB's witness, and employee/lobbyist Kolata. However, when specifically asked to identify deficiencies in Santanna's current materials, Kolata refused to provide any substantive details other than to state that the pre-pay feature of Santanna's service was not disclosed. Tr. at 413-17. Kolata's conclusory statement, however, is contradicted by the materials themselves, which plainly disclosed that Santanna's customers would be invoiced for gas delivered to storage for later use, as set forth more fully in Section II.A.1.-4., *infra*. Even when asked by CUB's counsel, Kolata did not provide any details. *Id.* at 431.

The Opposing Parties and Staff also avoided the subject of Santanna's current materials when cross-examining Santanna's President. Tr., pp. 56-248. Staff did not offer criticism of Santanna's current materials or cross-examine on the subject either. See Direct Testimony of Joan Howard ("Howard Direct"); see also Tr. at 46-56, 313-16.

The specific provisions of Santanna's marketing materials that disclose prices, terms and conditions are discussed in the immediately following sections.

1. Telemarketing materials.

a. Sales script.

Santanna's sales script discloses that Santanna's price is six cents per therm above the NGI monthly index rate, plus a \$3 per month administrative fee, that prices fluctuate and that past performance is no guarantee of future results. Gatlin Rebuttal, Ex. 1.03.

Howard aptly testified, confusion can result even when adequate disclosure is made and efforts are undertaken to prevent the confusion. Tr. at 508.

Santanna's sales script also discloses the details about Santanna's storage program, specifically advising that customers will buy more gas in the summer than they will use; that customers' summer bills will be significantly higher than customers have received in the past; that the extra gas that customers buy in the summer will be stored for their use in the winter, when prices are historically higher than summer prices. *Id.* It also discloses the three-year length of service for which customers would be signed up; that customers can cancel within 60 days of first gas deliveries without incurring a fee; the amount of Santanna's early termination fee for cancellations after 60 days but before three years; and the rate at which Santanna will credit customers for their unused gas. *Id.* It also provides Santanna's phone number. *Id.*

b. Verification script.

Santanna's verification script discloses Santanna's price of the NGI monthly index rate plus six cents per therm, plus a \$3 per month administrative fee and that prices will fluctuate from month to month. Gatlin Rebuttal, Ex. 1.12.

Santanna's verification script also disclosed details about Santanna's storage program, specifically advising that customers will buy more gas than they use during the summer months, when prices are historically lower; that customers' summer bills will higher than normal; and that customers will buy less gas in the winter when prices are historically higher. *Id.* It further discloses that Santanna would be the customers' natural gas supplier for three years; that customers will receive a welcome letter (the disclosures made in this letter are discussed *infra*); that Nicor will continue to send customers their bills; and that customers can cancel within the first 60 days of service without incurring a cancellation fee. *Id.* It also discloses Santanna's telephone number. *Id.*

Neither the Opposing Parties nor Staff offered any specific criticism of these sales and verification scripts. They did not identify information that should have been included but was not, and they did not identify information that was included but should have been omitted.

Not only are Santanna's most recent telemarketing scripts compliant with the AGSL, but Santanna's continuous efforts to improve them demonstrate its willingness to take any necessary steps to maintain that compliance and make full disclosure to prospective customers. Santanna made revisions to telemarketing sales and verification scripts based on customer feedback. Gatlin Rebuttal, p. 11 and Exs. 1.03, 1.08–1.12 thereto; Tr. at 124 (Gatlin). Santanna submitted its scripts to Nicor and Peoples for feedback and incorporated the minimal input it received. Gatlin Rebuttal, p. 11. Santanna also consulted with the Attorney General in an effort to ensure that its materials were AGSL-compliant. *Id.* CUB, the Attorney General and Staff have all seen Santanna's most recent scripts and have provided no input, within this proceeding or without. *Id.* At 12. Admittedly, none of those parties are required to provide input, but as entities charged at least in part with consumer protection, they would seemingly advise Santanna of any concerns. Each incarnation of Santanna's scripts made additional and/or clearer disclosures about Santanna's program. Tr. at 124-25, 135, 138-39 (Gatlin); see also e.g., Gatlin Rebuttal, p. 11 and Exs. 1.03, 1.08-1.12.

2. Door-to-door marketing materials.

Santanna's door-to-door marketing materials consist of the sales scripts discussed at Section II.A.1, *supra*, and a written contract, about which virtually no concerns were voiced.

Santanna's contract clearly discloses Santanna's identity as a natural gas supplier, together with Santanna's prices, terms and conditions. Gatlin Rebuttal, Ex. 1.14. It discloses Santanna's price of the NGI Index rate per therm plus six cents plus a \$3 per month

administrative fee. *Id.* It discloses the three-year term of the contract; the customer's right to cancel within the first 60 days of service without a cancellation fee; the imposition of a cancellation fee after 30 days but prior to the expiration of the contract; and the formula for crediting the customer for unused storage gas. *Id.*

The contract further discloses the details of Santanna's storage program as follows:

The amount of gas delivered by [Santanna] to [the customer] shall be determined by Nicor. The quantity shall be deemed equivalent to [the customer's] requirements on an annual basis. The quantity will not equal [the customer's] usage each month, except by coincidence. Rather, [the customer] understands that s/he will buy more gas in the warmer months, which will be stored for the [customer's] use in the colder months. Accordingly, [Santanna's] gas deliveries to [the customer] may exceed [the customer's] gas usage in a given month, or vice-versa. [The customer] shall pay [Santanna] each month based on the quantity of gas delivered and not based on the quantity of gas used.

Id. (emphasis in original). It also discloses Santanna's toll-free phone number. *Id.*

CUB's only criticism of Santanna's most recent contract, made apparent upon cross-examination of Gatlin but not affirmatively offered, was the inclusion of an arbitration clause. Tr. at 230-31 (Gatlin). However, the inclusion of an arbitration clause is neither illegal nor unethical, and it does not make the contract non-compliant. Arbitration clauses are a staple in many present-day consumer contracts. *Vigil v. Sears Nat'l Bank*, 2002 WL 987412, *4 (E.D. La. May 10, 2002); see also *See Johnson v. Baumgardt*, 216 Ill.App.3d 550, 555-56, 576 N.E.2d 515 (2d Dist. 1992) (holding that "[t]he purpose of arbitration is to avoid the formalities, delay and expenses of litigation in court. Arbitration as a means of dispute resolution is favored and is regarded by courts as an effective and cost-efficient method of resolving disputes"); see also Federal Arbitration Act, 9 U.S.C. §1, *et seq*; Illinois Uniform Arbitration Act, 710 ILCS 5/1, *et seq.* At worst, the clauses could be found to be unenforceable and have no impact on customers.

In general, as with Santanna's scripts, challenges to Santanna's written contracts were inappropriately focused on outdated materials. Tr. at 209-19.

3. Welcome letter.

Santanna's welcome letter provides lengthy explanations of the prices, terms and conditions of Santanna's program.²⁰ Gatlin Rebuttal, Ex. 1.04. Santanna sends its welcome letter to every customer, regardless of the method by which they signed up with Santanna. Gatlin Rebuttal, p. 14.

The welcome letter advises customers that Santanna "will deliver to you more gas than you use in the warmer months, when prices have historically been lower, and it will be stored for your use in the colder months, when prices have historically been higher." Gatlin Rebuttal, Ex. 1.04. It discloses that customers "will be billed each month for the amount of gas delivered, regardless of the amount [they] use." *Id.* The welcome letter also contains the following analogy to aid customers' understanding:

Think of storage like filling up your car with gas before a summer holiday. You will have to buy the gas anyway, but if you wait until the holiday weekend, prices will be higher. Your annual deliveries are expected to be substantially similar to the amount of gas you buy on a usage-based program, but with the benefit of buying some of your gas in the historically less expensive, warmer months.

Id. The welcome letter further explains that "[f]or this reason [buying gas for use in the winter at the historically lower summer prices], your summer bills should be significantly higher than you are used to seeing." *Id.* The letter also explains to customers how they can keep track of the amount of gas they buy, as follows:

"You can track your storage in the Natural Gas Cost section of your Nicor [or Peoples] invoice. The storage level you start with each month is noted as 'Beg';

²⁰ Santanna's superceded welcome letter also contained full explanations of the prices, terms and conditions of Santanna's service and took particular pains to explain that customers would buy more gas in the summer than they would use. Gatlin Rebuttal, p. 10 and Ex. 1.05 thereto. Some of the terms that Santanna used to explain its service to customers came directly from the applicable tariffs. *Id.*

the gas delivered to your account during the month is noted as 'Flow'; gas that is consumed from your account during the month is noted as 'Use' and your month-end balance is noted as 'End'."

Id. The welcome letter also advises customers know that Nicor is still their utility, will deliver their gas to them and make any adjustments in the amount of gas customers receive. *Id.*

Kolata's criticism of Santanna's welcome letter proved baseless. Tr. at 376-77. Kolata testified that the letter mischaracterized Santanna's services because "it made it seem like the storage component itself of its program is unique, that it is the only one providing storage, when in fact all utilities and alternative suppliers provide the benefit of suppliers." *Id.* at 376. A review of the welcome letter reveals no such mischaracterization. Gatlin Rebuttal, Ex. 1.04. Santanna accurately portrays its program as providing customers with a unique program that allows them to buy natural gas during the summer at historically lower prices and store it for use in the winter when prices are historically higher. *Id.* at 23 and Ex. 1.04. Contrary to Kolata's testimony, the welcome letter does not state that it is the only gas supplier offering storage. *Id.* Rather, Santanna's program is unique in passing the benefit of storage on to its customers, unlike other gas suppliers. *Id.* Gatlin's testimony on this point was unrefuted.

Kolata further criticized the letter for not telling customers that they will be paying for gas before they use it. Tr. at 378. But, the letter plainly does exactly that. Santanna

will deliver to you more gas than you use in the warmer months, when prices have historically been lower, and it will be stored for your use in the colder months, when prices have been historically higher.... [Y]ou will be billed each month for the amount of gas delivered, regardless of the amount that you use.... [Y]our summer bills should be significantly higher than you are used to seeing....

Gatlin Rebuttal, Ex. 1.04. Upon further cross-examination, Kolata conceded that the letter gets across the point that customers will pay for more gas than they will use during the summer months. Tr. at 382-83.

While Kolata maintained his belief that Santanna's welcome letter was insufficient, he provided no basis for that belief, which was typical of his testimony. In the end, Santanna's welcome letter clearly discloses all aspects of Santanna's program.

4. Follow-up letter.

To further inform customers, Santanna sends out a letter in addition to its welcome letter to those customers that had signed up for service but not yet received their first bill.²¹ Tr. at 269 (Gatlin). This letter further emphasizes the details of Santanna's storage program, as follows:

. . . you elected to participate in the NICOR Gas Customer Select program with Santanna Energy Services as your gas supplier. You were then mailed a welcome letter by Santanna that repeated the terms and conditions. In a couple of paragraphs in [that] letter, special emphasis was placed on STORAGE, and the important role it plays in the potential savings of the Customer Select program. If you did not retain that letter, a typical welcome letter can be seen on the web at WWW.SANTANNAENERGYSERVICES.COM. For additional information on storage, its characteristics and potential benefits, view more than half a dozen articles at <http://www.nicorinc.com/gas/storagebrochure/>.

You should receive your first bill from NICOR soon and the Santanna gas charges will be a part of that bill. The volumes that Santanna delivered and invoiced you for in that first invoice will be significantly more than you used that month, but they are volumes that NICOR required Santanna to deliver for your account.

Gatlin Rebuttal, Ex. 1.18. The follow-up letter also states as follows:

As indicated, because of your start date, NICOR requires that you receive a substantial portion of your total storage in the summer, which you will notice on your upcoming invoice. Please don't be alarmed. The storage component results in your (1) paying more dollars for gas in the summer, because you buy more gas, but historically at a lower price and (2) less dollars in the winter than normal, because you buy less gas during that historically higher priced time of the year.

Id. The letter also gives a hypothetical example to aid customers in their understanding of Santanna's service. *Id.* The Opposing Parties offered no criticism of the follow-up letter.

* * *

²¹ Gatlin testified that Santanna may decide to send the follow-up letter out to every Santanna customer, depending on whether customer feedback indicated that it was needed. Tr. at 270.

Kolata correctly testified that Santanna's current materials did not cure any deficiencies in Santanna's superceded materials. *Id.* at 431. However, Santanna's materials were not defective. More importantly, however, the appropriate focus is whether Santanna's ultimate product (which was in place by August 9, 2002) was compliant with the AGSL. Additionally, no witness offered testimony about how many customers may have signed up with Santanna under the prior materials. Even then, if any customers were confused, they had the opportunity to call Santanna with questions, or even to cancel their Santanna service. Some residential customers did cancel, but as of August 22, 2002, over 38,000 remained Santanna customers. Gatlin Rebuttal, p. 4.

5. The Opposing Parties' contentions that additional disclosures are required are wrong.

a. Santanna is not required to disclose that it has free use of customers' money between summer and winter, because it is untrue.

The Attorney General sought to elicit from Gatlin that Santanna had the free use of customers' money between summer and winter. Tr. at 104-9. The effort was futile, however, because Santanna paid for the gas it delivered to its customers contemporaneously with the delivery; it did not have the luxury of waiting to pay for the gas until the gas was used by customers. Tr. at 105, 297 (Gatlin). Nothing in the record indicates that Santanna had the "free use" of customers' money at any time. This failure to check basic facts is symptomatic of the Opposing Parties' failure to provide the Commission with supported, admissible evidence.

b. Santanna is not required to describe its storage program as a "physical hedge."

Kolata contended that Santanna was required to disclose that its natural gas service entailed a physical hedge. Kolata Direct, pp. 7-8. However, Santanna disclosed in multiple

ways that customers would buy gas to store for later use. As such, Santanna adequately described a “physical hedge,” regardless of the absence of industry jargon.

- c. **Santanna is not required to disclose an estimate of the amount that a bill would increase during the summer, the amount that customers will save by using Santanna, or what would happen if summer prices exceeded winter prices.**

Kolata testified that Santanna should make these disclosures. Kolata Direct, p. 8. Kolata’s opinions, unsupported as they are, are groundless because they ignore Santanna’s disclosures. Furthermore, Kolata cited no basis for his belief that such disclosures are required under the AGSL. Indeed, Kolata did not even identify any customer complaints on these topics. All that is required is adequate disclosure, which is meaningful disclosure. “*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between ‘competing considerations of complete disclosure...and the need to avoid...[informational overload].’” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 100 S. Ct. 790, 798(1980) (emphasis and brackets in the original) (addressing the Truth In Lending Act). Kolata never attempted to explain why Santanna should make more disclosures. Indeed, a lack of customer complaints on these issues demonstrates the lack of need for such over-disclosure.

Regardless, Santanna does disclose that customers’ summer bills could be substantially higher than their previous summer bills. Santanna’s welcome letter states, “For this reason [buying gas in the summer at historically lower prices for use in the winter], your summer bills should be significantly higher than you are used to seeing.” Gatlin Rebuttal, Ex. 1.04. Additionally, Santanna discloses that gas prices fluctuate and that past prices were no guarantee of future prices.²² *Id.*, p. 22 and Ex. 1.03.

²² Kolata testified that summer 2000 prices were higher than winter 2000 prices (Kolata Direct, p. 8), but that that is inconsistent with the actual market prices, which reflect the historical norm. Gatlin Rebuttal, p. 22 and Ex. 1.19.

Moreover, the first two disclosures Kolata urges are impossible to make. First, Santanna cannot determine the invoice difference a customer should expect. The utilities (*e.g.*, Nicor) determine how much gas Santanna must deliver to customers, and even then only immediately preceding the beginning of each month. Gatlin Rebuttal, p. 21. Second, natural gas is a commodity with fluctuating prices, thus precluding prediction of future prices, even Santanna's own prices, which are pegged to a market index. *Id.* Kolata also offers no manner in which Santanna could predict competitors' future prices. Disclosure of prices that would, in all likelihood, be wrong would prove more confusing to consumers. All of these factors preclude Santanna from predicting invoice amounts or savings expectations.

B. Santanna adequately supervised its marketers.

1. Telemarketers.

Santanna created its telemarketing scripts; sent personnel to the telemarketing call center to learn about the telemarketer's operations, including how telemarketing employees were hired, trained, performed their job and recorded data; provided materials for telemarketing companies to use in training their employees; told the marketers to follow its instructions; and was in regular contact with the telemarketers regarding quality assurance issues. Tr. at 152, 154-55, 157-58 (Gatlin); Gatlin Rebuttal, Ex. 1.17.

Santanna listened in on random telemarketing calls for quality assurance purposes; had verifications tape-recorded and compared those tapes to its scripts; monitored its telemarketers by keeping in almost constant communication with them and conscientiously following-up on consumer complaints with the telemarketers' management; and specified categories of complaints that telemarketing companies were required to investigate. Gatlin Rebuttal, pp. 14, 19 and Ex. 1.17; Tr. at 158-59, 198 (Gatlin). Additionally, Santanna's contracts with its

telemarketers required them to adhere to standards, including acting in a professional manner and refraining from making representations not authorized by Santanna. AG Cross Ex. 4. Santanna also disciplined its companies. It required that individual marketers be disciplined and put telemarketing companies on probation for misconduct. Gatlin Rebuttal, Ex. 1.17.

CUB referenced to an e-mail to Peoples from an alleged Peoples' employee as evidence that Santanna did not properly supervise its telemarketers. Tr. at 126-31 (Gatlin); CUB Gatlin Cross-Ex. 1. The allegations in the e-mail do not resemble in the slightest any of Santanna's telemarketing scripts. Tr. at 131 (Gatlin). If a telemarketer truly repeatedly asked for meter and account number information and would not provide the details of Santanna's natural gas services, that individual telemarketer would have grossly deviated from the script and guidelines Santanna provided.

Santanna continued utilizing its telemarketers, even after some complaints arose. In hindsight, Santanna would have handled it differently. Tr. at 278 (Gatlin). Those complaints arose in an extremely short period of time, and Santanna quite reasonably thought that it could fully address the issues by working with the telemarketers to solve "bad apple" problems stemming from isolated individual marketers rather than creating new relationships with other telemarketers, which would have taken time and had no guarantee of avoiding similar problems.²³ *Id.* at 278-79.

2. Door-to-door marketers

Santanna adequately supervised the door-to-door marketing operation. Santanna provided materials to the marketing companies for use in training their employees; created the

²³ No evidence has been presented to show that the problems were anything but isolated "bad apple" problems. The Opposing Parties point to the number of consumer complaints as evidence of widespread problems, but that is discredited by the fact that Santanna had over 38,000 satisfied customers. Gatlin Rebuttal, p. 4. Further, the most

sales and verifications scripts and prepared the handouts. Tr. at 156, 165 (Gatlin); Gatlin Rebuttal, Ex. 1.17. Santanna required door-to-door marketers working on its behalf to wear buttons that stated “I am not a utility employee” and to wear clothing and identification tags identifying them as Santanna representatives. Gatlin Rebuttal, p. 14; Tr. at 197-98 (Gatlin).

Santanna monitored the marketing process by keeping in frequent communication with the marketers and diligently following-up on consumer complaints with the management of the marketing companies. Gatlin Rebuttal, p. 19; Tr. at 198 (Gatlin). At one point, Santanna required one of its primary marketers to suspend efforts and retrain staff to address consumer complaints. Tr. at 202-05 (Gatlin) and CUB Gatlin Cross-Ex. 14. This was a part of Santanna’s overall effort to getting rid of the “bad apples” among the marketing representatives. Tr. at 204-5. As with the telemarketers, Santanna disciplined marketers for alleged misconduct, including discipline of individual marketers and putting marketing companies on probation. Gatlin Rebuttal, Ex. 1.17.

The Opposing Parties referred to Santanna door-to-door marketers allegedly posing as Nicor employees (Tr. at 166), but there was no evidence that this conduct was widespread. CUB referenced an internal Santanna e-mail in an attempt to show a pattern of this conduct. Tr. at 178-81 (Gatlin). The e-mail’s author, however, did not know any details of this conduct, speaking only in generalities and not indicating frequency. CUB Gatlin Cross-Ex. 9. The other documents and testimony in this proceeding indicate that it was isolated.

As Gatlin testified, Santanna is not served by marketers misrepresenting themselves as Nicor employees, because customers would simply switch back to Nicor, while Santanna would be saddled with bad publicity and possible legal and regulatory sanctions. Tr. at 181; Gatlin

prevalent complaint was confusion about the storage program, which Santanna fully addressed in updated marketing materials.

Rebuttal, pp. 17-18. Further, when this type of conduct was brought to Santanna's attention, Santanna immediately and unequivocally addressed it. The following email is one such example:

Allegedly, you have a young black man in St. Charles that went to the home of [redacted] stating that he was from Nicor gas today. Please make sure that none of your reps misrepresent themselves in this manner.

Tr. at 169-70 (Gatlin) and CUB Gatlin Cross-Ex. 4. Santanna also brought to the attention of a marketer the possibility that two door-to-door marketers were intoxicated and demanded that they be fired if the allegations turned out to be true. Gatlin Rebuttal, Ex. 1.15. The marketer did, in fact, fire the individual marketers. Tr. at 199-200 (Gatlin) and CUB Gatlin Cross-Exs. 6 and 7. Further, Santanna threatened to fire a marketer if it did not take corrective action with regard to alleged misconduct. Tr. at 181-82 (Gatlin) and CUB Gatlin Cross-Ex. 10. Santanna conducted an investigation into each marketer complaint it received. Tr. at 175 (Gatlin).

3. Santanna did not engage in a pattern and practice of slamming.

Santanna is the first to acknowledge that there have been isolated incidents of improper switching, as in the case of AE and MR Gatlin Rebuttal, p. 18; Tr. at 44 (Gatlin). However, and importantly, Santanna has never had a practice or engaged in a pattern of "slamming" and no witness presented any evidence to the contrary.

Santanna proved that two consumers' allegations of slamming via telephone were false. Tr. at 305-12 (Gatlin), 404-06 (Kolata) (consumers TLK and VP). In direct contravention of TLF's and VP's complaints lodged with CUB, tape recordings revealed that the customers clearly agreed to Santanna's service. *Id.*; see also Gatlin Re-direct Ex. 2 (transcript of TLK verification tape); Santanna Kolata Cross-Ex. 7 (transcript of VP verification tape).

Santanna also disproved two customers' allegations that they never signed an agreement to become Santanna customers by showing that their signatures on affidavits matched the signatures on their contracts. Tr. at 348-58 (Kolata) (consumers LB and TC). CUB obtained an affidavit from LB, who affirmed that she only signed a document with just signature lines. *Id.* at 422 (Kolata); Santanna Kolata Cross-Ex. 4. It defies belief that a consumer would sign a document containing only signature lines or with the remainder of the document concealed, and, there is no proof, aside from a self-serving affidavit by an affiant not subject to cross-examination, that Santanna used documents containing only signature lines. Further, LB claimed that the signature on her Santanna contract is not hers, but the signatures on the contract and the affidavit are indisputably from the same person. Santanna Kolata Cross-Ex. 4.

CUB also obtained an affidavit from TC, who affirmed that he merely signed a petition with other signatures on it. Tr. at 422-23 (Kolata). CUB offered no further explanation of TC's signature on his Santanna contract and offered no additional evidence, again aside from a self-serving affidavit by an affiant not subject to cross-examination, that Santanna requested potential customers to sign petitions. As with LB, however, the signature on TC's affidavit is the same as the signature on TC's contract. Santanna Kolata Cross-Ex. 5.

The foregoing examples were not of Santanna's original choosing, but were drawn from verification tapes and contracts requested by CUB on the theory that they showed slamming incidents. Gatlin Rebuttal, p. 17; see also Tr. at 367-68 (Kolata) (acknowledging that these customers complained of slamming). The fact that Santanna showed slamming allegations to be false among complaints of CUB's choosing underscores the unreliability of the consumer complaints and the opinions espoused by Kolata and Hurley premised upon those unverified

complaints.²⁴ Additionally, these proven-to-be-false allegations of slamming should be contrasted with zero allegations that the Opposing Parties proved true. These false accusations are a vivid indication that no reliable testimony about how many people were “slammed” was presented. Yet, despite the lack of a factual foundation, Kolata inappropriately speculated that Santanna engaged in a “pattern and practice” of “slamming.” Kolata Direct, p. 11-12.

Moreover, on multiple occasions, Nicor or Peoples requested verification tapes from Santanna in response to slamming complaints. Gatlin Rebuttal, pp. 12-13. In every instance, Nicor or Peoples found the verifications to be adequate. *Id.* In additional efforts to prevent slamming, Santanna also revised its telemarketing and verification scripts on several occasions. *Id.*, pp. 10-11, 14.

There can be any number of reasons why customers would make slamming allegations containing untrue information. Santanna has suggested but a few, including faulty memory, failure to listen or read materials and dishonest motive. Gatlin Rebuttal, pp. 13, 29. Courts treat consumer complaints with great suspicion because of consumer bias and the fact the complaints often take the form of double hearsay without any circumstantial guarantees of trustworthiness. See e.g., Minnesota Mining & Mfg. Co. v. Nishika Ltd., 885 S.W.2d 603, 631 (Tex. App. 1994) (holding that customer complaints are viewed as untrustworthy because they are “very accusatory and self-serving”). Indeed, Kolata acknowledged that customer VP may have simply forgotten that she authorized Santanna to be her natural gas supplier. Tr. at 424. Kolata further testified that many of the complainants were elderly and that the peoples’ memory gets worse as they age. *Id.*

²⁴ Santanna does not deny the validity of some customer complaints, perhaps many. Gatlin expressly acknowledged the apparent truth of two slamming complaints. Gatlin Rebuttal, p. 18; Tr. at 44. This simply cannot be parlayed into an opinion that all such complaints are true.

Equally plausible is that customers in receipt of higher-than-usual gas bills due to the storage component of Santanna's program responded by claiming that they never wanted the service.²⁵ This sort of scenario was a basis for Gatlin's testimony that some of the consumers making complaints to CUB and the Attorney General are misrecollecting or fabricating the facts. Tr. at 191-94 (Gatlin). Contrary to CUB's assertion that Gatlin accused Santanna's customers of lying (Tr. at 415-16 (Kolata)), Gatlin merely offered various plausible explanations for the patently false claims of slamming. Tr. at 190-94 (Gatlin). The evidence presented by Santanna clearly demonstrated that some customers' claims of slamming were wholly untrue, regardless of the customers' motivation for making the claims.

Kolata's conclusion that Santanna's marketers had an incentive to slam customers was groundless. Kolata speculated that each sales associate is compensated for each successful sale. Kolata Direct, p. 12. On cross-examination, however, Kolata conceded that there is no factual basis in the record for his opinion regarding sales associate compensation. Tr. at 408-10. Further, Gatlin testified that he did not know how individual telemarketing sales people were paid. Tr. at 161. Further, Santanna does not pay its marketing companies unless a customer authorizing a switch remains a Santanna customer for at least 60 days. Gatlin Rebuttal, p. 15; Tr. at 410 (Kolata). Moreover, Santanna has no incentive to engage in a practice of slamming because (1) Santanna must be able to prove service switch authorizations; (2) the utilities can remove Santanna from their customer choice programs if Santanna violates standards of conduct

²⁵ An observer must keep in mind that Santanna was marketing a program with storage as a requisite component part. The Customer Select and Choices For You programs require Santanna to deliver enough gas to customers to bring their storage levels up to levels determined by Nicor and Peoples before the onset of cold weather. Tr. at 96-97, 265-66 (Gatlin); Gatlin Rebuttal, p. 8. Because all relevant customers activated with Santanna in the Spring and early Summer, Santanna was forced to achieve the mandatory storage levels on a shortened time schedule, which resulted in bills that were much larger than customers were used to seeing. *Id.* If consumers had signed-up with Santanna under Choices For You between November and March, their initial monthly bills would have reflected charges only for the amount of gas they used because the applicable tariff does not require new accounts to meet storage targets during that time. Gatlin Rebuttal, p. 8; Tr. at 267-68 (Gatlin).

in applicable tariffs; (3) Santanna and the local utility send letters informing customers of the fact that their service will be switched;²⁶ (3) it invites customer backlash, requiring resource expenditures; and (4) it invites regulatory scrutiny, possibly resulting in Santanna's inability to conduct business, sanctions and expenditure of resources. Gatlin Rebuttal, Exs. 1.03, 1.06, 1.07, 1.04, 1.12, 1.13 and 1.14; see also 220 ILCS 5/19-120.

Kolata testified that he believed consumers' statements that they were slammed without ever having any contact with Santanna. Tr. at 398-99. However, it is virtually impossible for customers' accounts to be switched to Santanna without some contact. Gatlin Rebuttal, p. 16. Kolata acknowledged that Santanna could not submit accounts for switching without providing confidential information obtainable only from the consumers. Tr. at 398-99 (Kolata). In an incredible attempt to explain how Santanna could obtain this information without having contact with customers, Kolata suggested that Santanna may be intercepting customer bills in the mail. *Id.* at 399. Kolata conceded that his suggestion was without any factual basis. *Id.* at 399-400.

C. Santanna's Billing Statements Adequately Describe Services And Prices.

1. Santanna makes adequate disclosure in its allotted portion of the Nicor and Peoples billing statements.

Santanna's portion of the utility bills adequately describes its prices and customers' usage and storage balances. Gatlin Rebuttal, Exs. 1.21 and 1.22. Kolata testified that Santanna should have informed customers of how much gas they used and how much they purchased for storage. Kolata Direct, pp. 9-10; Tr. at 387 (Kolata). Santanna's portion of the utility bills does, in fact, advise customers of the volume of gas delivered, their usage and storage levels. Gatlin Rebuttal, Exs. 1.21 and 1.22.

²⁶ See e.g., *Citizens Utility Board Request for an Investigation Into the Current Structure of the Nicor Customer Select Pilot Program*, Consolidated Docket Nos. 00-0620 and 00-0621, 2001 Ill. PUC Lexis, 753, *78 (July 5, 2001) (holding that the mandatory letters are an "effective way to...deter slamming").

Kolata's opinion also ignored the fact that Santanna does not send out its own bills but rather utilizes a portion of the utilities' bills to inform customers of Santanna charges. See e.g., Gatlin Rebuttal, Exs. 1.06 and 1.07. The local utilities allot only limited space to Santanna. *Id.* Santanna effectively used the limited space to describe its services and prices. *Id.* at pp. 23-24 and Exs. 1.21 and 1.22. Further, Kolata conceded that Santanna does not have as much allotted space on Nicor bills as on Peoples bills. Tr. at 387. Kolata also conceded that he has not analyzed whether it was possible to fit further information into Santanna's portion of the Nicor billing statement. *Id.* at 388. Kolata further conceded that Santanna's billing information contains no false information. *Id.* at 433-34.

2. Santanna adequately defines terms.

Kolata criticized Santanna's failure to include definitions for the terms "Beg Flow Usge End" in its portion of the Nicor billing statements. Kolata Direct, p. 9, Tr. at 389. Kolata admitted, though, that those terms are defined in Santanna's welcome letter. Tr. at 389. Kolata did not attempt to describe how Santanna could fit definitions for these terms into the space that Nicor allots to Santanna. *Id.* at 388-89.

3. Gross gas sales need not equal "flow."

Kolata's suggestion that gas "flow" to the customer should equal gross gas sales is without basis. Kolata Direct, p. 10. Applicable tariffs allow utilities to "deduct" a certain volume of gas that dissipates in the pipelines. Gatlin Rebuttal, p. 24 and Ex. 1.06, Sheets 75.4 and 75.5 and Ex. 1.07, Sheets 155 and 160 thereto.

D. Santanna Accommodated Every Refund Request, Provided Refunds At Prices Higher Than Contractually Required And Never Collected A Single Early Termination Fee.

Santanna has honored each cancellation request in a timely fashion. Gatlin Rebuttal, p. 27; Tr. at 110 (Gatlin). Santanna processes cancellation requests within a couple of days and submits the information to the applicable utility. Tr. at 110 (Gatlin). Once the information is submitted to the utility, the utility advises Santanna of Santanna's last date of service to the customer. *Id.* The amount of time between Santanna's submission of a cancellation request and the actual switch from Santanna service is beyond Santanna's control. Gatlin Rebuttal, p. 9. Santanna explicitly communicates this to canceling customers in a letter as follows:

The purpose of this letter is to inform you that we have started the process. While we have initiated the immediate process of your cancellation, **it is important to note that SES does not determine the date that your service will return to Nicor Gas.** This date is determine by Nicor Gas, and can take up to one billing period.

Gatlin Rebuttal, Ex. 1.01 (emphases in original).

Upon cancellation of an account, Santanna has given refunds for stored gas at prices higher than required by Santanna's agreements with its customers. Gatlin Rebuttal, p. 9. Santanna's agreements required that it credit stored gas at a rate of 90% of the then-current index price. *Id.*, p. 9 and Exs. 1.03 and 1.04; Tr. at 297-98 (Gatlin). However, Santanna has voluntarily credited customers at 100% of the price they paid for the stored gas, which resulted in larger credits to customers. Gatlin Rebuttal, p. 9; Tr. at 112, 297-98 (Gatlin).

Santanna's contracts allowed Santanna to collect early termination fees. Tr. at 221-22 (Gatlin); see also e.g. Gatlin Rebuttal, Ex. 1.14. However, Santanna has never imposed or collected an early termination fee from any customer. Tr. at 300 (Gatlin).

III. CONSUMER COMPLAINTS WERE UNSUBSTANTIATED AND THEREFORE MUST BE GIVEN ONLY THE WEIGHT DUE TO UNPROVEN ALLEGATIONS.

Santanna does not dispute that many of the complaints against it and its marketers are undoubtedly true. Gatlin Rebuttal, p. 19. As Santanna proved, however, not all of those

complaints are true. Tr. at 305-12 (Gatlin), 404-06 (Kolata); see also e.g., Section II.B.3, *supra*. Given the time constraints of this proceeding, Santanna naturally did not present evidence as to each complaint. Indeed, Santanna presented evidence related only to customers about which other parties requested information through data requests. Nonetheless, even the limited evidence presented by Santanna highlights the fact that all of the complaints are merely unsubstantiated allegations.

Santanna shares the Opposing Parties' and Staff's concern about the number of consumer complaints against Santanna. Gatlin Rebuttal, pp. 28-29. However, those complaints cannot be taken as true and as an indication that Santanna engaged in widespread misconduct. Many complaints reflected customer confusion, but confusion can result even when disclosures are adequate. Tr. at 508 (Howard); see also *Citizens Utility Board Request for an Investigation Into the Current Structure of the Nicor Customer Select Pilot Program*, Consolidated Docket Nos. 00-0620 and 00-0621, 2001 Ill. PUC Lexis 753, *17 (July 5, 2001). Notwithstanding the admission into evidence of several exhibits despite their lack of foundation, for which Santanna maintains its objections, the Commission should accord those exhibits very little weight. Some specific examples follow.

CUB contended at hearing that several exhibits were admissible under the business records exception to the hearsay rule. Tr. at 252 (addressing CUB Gatlin Cross-Ex. 3).²⁷ The Commission admitted e-mails and e-mail chains (CUB Gatlin Cross Exs. 1, 4, 6, 8, 9, 10, 11, 12, 13, 14 and 17), two pages from a database of Santanna customer complaints (CUB Gatlin Cross Ex. 3), a customer complaint letter (CUB Gatlin Cross Ex. 5), internal Santanna correspondence

²⁷ CUB Gatlin Cross-Ex. 3 was particularly unsuited for the business records exception because it was created by Consumer Choice, Inc. ("CCI"), which was a marketer for Santanna. Because no one from CCI even testified at the hearing, it was impossible for CUB to lay a foundation.

(CUB Gatlin Cross Ex. 7) and signed contracts (CUB Gatlin Cross Exs. 16 and 18). Over Santanna's objection, CUB's exhibits were admitted into evidence with the proviso that they would be accorded the appropriate weight. See e.g., Tr. at 254-55, 262 (Gatlin). Although these exhibits are in evidence, they should be accorded very little, if any, weight because they do not qualify as business records.

The Illinois business records exception requires a showing that "(1) the writing or record was made as a memorandum or record of the event; (2) it was made in the regular course of business; and (3) it was the regular course of the business to make such record at the time of such transaction or within a reasonable time thereafter." *People v. Virgin*, 302 Ill. App. 3d 438, 707 N.E.2d 97 (1st Dist. 1998). Additionally, the "foundation must be established through testimony by someone familiar with the business and its mode of operation." *Id.* CUB did not lay a foundation for any of the above-listed exhibits. CUB did not offer any witnesses who could testify that the records were made as recordings of events and were made in a timely fashion during the regular course of business.

Regardless, the business records exception does not apply to consumer complaints, because they constitute double-hearsay. See *Cleary and Graham's Handbook of Illinois Evidence* §805.1, pp. 893-94. Courts have a long tradition of excluding complaints from evidence as hearsay because of their inherent unreliability. See e.g., *Minnesota Mining & Mfg.*, 885 S.W.2d at 631 (precluding unsubstantiated complaint letters about photographic products); *Peters v. Johnson & Johnson Prods., Inc.*, 783 S.W.2d 442 (Mo. App. 1990) (precluding unsubstantiated complaint reports from tampon users). Courts regard customer complaints as untrustworthy because they are "very accusatory and self-serving." *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 885 S.W.2d 603, 631 (Tex. App. 1994). Complaints are not made under oath

and are not subject to cross-examination, which has “been declared the greatest tool to arrive at the truth.” *Id.* at 631-32. Cross-examination is crucial to expose biases and credibility, accuracy, self-interest and prejudices. *Id.* at 632. Not a single complainant testified in this proceeding.

CUB relied on the Commission’s ruling in *Investigation Concerning Illinois Bell Telephone Company’s Compliance With Section 271 Of The Telecommunications Act of 1996*, Docket Number 01-0662, to contend that its proffered exhibits should be admitted into evidence. Tr. at 251. That ruling directly supports Santanna’s position that the Commission should accord very little, if any, weight to unsubstantiated communications and allegations. The Commission held that the records there were created “in the normal course of regularly conducted business activity of the type as would be reasonably relied upon by a prudent person in the conduct of his/her business affairs.” Commission Ruling dated July 2, 2002 in ICC Docket Number 01-0662, p. 1. The Commission relied upon the testimony of SBC’s Director of Cost Analysis in holding that hearsay evidence could be considered by the Commission because it can give the hearsay evidence the amount of weight commensurate with its reliability. *Id.* In quoting *McCormick On Evidence*, the Commission found that “the reliability of hearsay ranges from the least to the most reliable.” The Commission further held that “[h]earsay...is not subject to current, incourt [sic] cross-examination, but that limitation affects the weight the evidence carries, not its admissibility.” *Id.* at 2.

Here, in contrast, there was no witness to testify about the records and no foundation laid whatsoever. The Commission should therefore give the records the amount of weight dictated by their reliability. As discussed *supra*, the consumer allegations are inherently suspect. Some are undoubtedly true, but just how many are true must be known to offer opinions reliant upon them. The Opposing Parties presented no evidence showing how many of the consumer

complaints were true. The validity of those consumer allegations must be viewed through a prism of uncertainty. Even assuming *arguendo* that the complaints are true, they relate to dated alleged conduct, rather than providing an accurate portrayal of Santanna at the end of the 180-day grace period.

A. CUB Complaints.

While CUB intimated at numerous points in this proceeding that the allegations in customer complaints are true, even its counsel acknowledged that the allegations cannot be taken as true. See e.g., Tr. at 253. Nonetheless, CUB's purported expert Kolata testified that he took the allegations as true. *Id.* at 338-40. This is a particularly important and fatal flaw in his opinions that were based on the allegations. This is discussed in more detail in Section IV, *infra*. CUB does not verify the accuracy of complainant allegations. Santanna Kolata Cross-Examination Exs. 1 and 2. Rather, CUB merely paraphrases complaints registered by customers. *Id.* CUB talked to several complainants, obtained a few affidavits and obtained some verification tapes and contracts, but this activity was specifically for the purpose of this proceeding. Santanna Kolata Cross-Ex. 1. Moreover, Santanna proved that not all such complaints are true. See Section II.B.3., *supra*.

Much of Kolata's testimony was not worthy of credence.²⁸ He testified that he investigated the consumers making complaints with CUB simply by reading the complaints. Tr. at 345-46. Kolata testified that he established the "absolute truth" of a couple of consumers who made allegations verified simply by the fact that he spoke with those consumers. *Id.* at 339. It does not stand to reason that the absolute truth of those allegations is established by getting only half of the story.²⁹ Kolata conceded that he talked with only a few of the customers registering

²⁸ This was exemplified by Kolata's request for a clarification of the word "truth." Tr. at 337-38.

²⁹ Kolata's "investigation" into the "absolute truth" is further weakened because it was untimely.

complaints with CUB and spoke with them (his only “investigation”) only after he submitted his testimony. Tr. at 334, 336. Kolata reviewed the affidavits of only several customers who made allegations against Santanna. *Id.* at 337-39. Yet, despite this lack of investigation, Kolata groundlessly testified that in “all probability [] [the consumer allegations] are true.” *Id.* at 340.

B. Attorney General Complaints.

Hurley testified that the majority of the complaints the Attorney General received were from CUB. Tr. at 466. Hurley conceded that the Attorney General does not verify the veracity of the consumer complaints it receives and, therefore, does not know how many of the allegations are true.³⁰ *Id.* at 468-69, 475. Hurley’s admission undercuts his conclusion that Santanna’s marketing practices deceived consumers. Hurley Am. Direct, p. 5. Hurley also acknowledged he knows of no evidence supporting the conclusion that Santanna intended to deceive any consumers. Tr. at 474-75. Further, Hurley’s conclusion that Santanna misrepresented rates and savings comparisons was unsupported by examples. Hurley Am. Direct, pp. 5-6.

C. Staff Complaints.

Staff also acknowledged that it does not know how many of the consumer complaints it received concerning Santanna were true. Howard testified that the Commission does “not know the veracity of . . . customer allegations.” Howard Direct, p. 9.

* * *

It is, of course, unrealistic to expect the Opposing Parties to produce at hearing, subject to cross-examination, many of the consumers who registered complaints. That said, however, the

³⁰ Hurley further testified that the Attorney General is concerned only with serving as a mediator, rather than verifying the accuracy of allegations. Tr. at 468-69.

allegations remain unsubstantiated and lack foundation. Accordingly, it would be unjust to accord those collective allegations any significant weight.

IV. MANY OF KOLATA'S OPINIONS SHOULD BE DISREGARDED.

A. Kolata is not an expert in areas in which he offered opinions.

CUB presented Kolata as an expert in several areas (albeit just days prior to the hearing), but he is a paid lobbyist for CUB. Santanna Kolata Cross-Examination Ex. 1; Tr. at 329-30, 332 (Kolata). There is not even a pretense of objectivity associated with his testimony, and the Commission should discount his testimony because of his inherent bias against Santanna. Kolata's testimony highlights the critical difference between declaring expertise and establishing expertise. Kolata declared himself an expert in consumer education, ethics, legislative intent and management practices. Tr. at 323-25. However, Kolata did not demonstrate himself to be an expert in those areas, so the Commission should accord his testimony very little weight.³¹

Kolata claimed to be an expert in customer education but admitted that he has no formal education in the area of consumer education, no experience in consumer education (including, specifically, in the natural gas industry) and has not published anything related to consumer education. Tr. at 326-31. He also testified that his experience with customer education derives merely from several boards on which he sits due to his employment with CUB, by which he has been employed for only one year. *Id.* at pp. 327-28. Kolata also has no private sector management experience and no natural gas industry experience. Santanna Kolata Cross-Examination Ex. 1. Therefore, the Commission should disregard his non-lobbying opinions.

B. Kolata Impermissibly Speculated In Forming Numerous Opinions.

³¹ Kolata does appear to be an expert lobbyist. Tr. at 328-29. Lobbying, however, is not at issue in this proceeding.

Much of Kolata's testimony consisted of unsupported and unexplained opinions. Kolata testified that Santanna intended to defraud customers. Kolata Direct, p. 4; Kolata Supplemental Direct, p. 6. However, on cross-examination, he conceded that he knew of no evidence that Santanna intended to defraud customers.³² Tr. at 419. Further, it makes no sense that Santanna would attempt to defraud customers. See Section II.B.3., *supra*; see also Gatlin Rebuttal, p. 12.

Kolata speculated that 7000 of 12,000 Santanna customers canceled service before receiving natural gas because they were not informed of the true terms of Santanna's service. Tr. at 364. Kolata admitted, however, that he had not communicated with any of the 7000 customers, he had not conducted any investigation to use as a basis for his opinions, there were other possible reasons for customer cancellations and that he was speculating. *Id.* at 365-70. In sum, Kolata has no idea why those customers cancelled. One reason, however, was CUB's media blitz that publicized misleading, negative information about Santanna. Gatlin Rebuttal, p. 21. A sustained influx in cancellations immediately followed CUB's media blitz. *Id.*

For several of his opinions, Kolata relied on the allegations in the consumer complaints filed with CUB and assumed that those allegations were true. Tr. at 340, 401. As set forth *supra*, however, those allegations cannot be taken as true. As such, Kolata's reliance on those allegations was inappropriate. Although the Commission provides looser standards of evidence in enumerated areas, expert opinions are not listed as one of those areas. 83 Ill. Adm. Code §200.610. Illinois law provides that expert opinions cannot be given without sound bases. See e.g., *Volpe v. IKO Indus. Ltd.*, 327 Ill. App. 3d 567, 577, 763 N.E.2d 880, 877 (1st Dist. 2002).

³² Kolata seized on an internal Santanna email containing a single Santanna employee's poorly-chosen words regarding allegations that one or more door-to-door marketer employees were representing themselves as Nicor employees. No evidence was presented demonstrating the truth of those allegations. Furthermore, no evidence of Santanna's alleged fraudulent intent was presented. Gatlin testified to the contrary. Gatlin Rebuttal, p. 18.

Although none of Kolata's opinions were stricken, which Santanna maintains should have occurred, his opinions should be accorded little weight.

V. SANTANNA IS AN IMPORTANT COMPETITOR IN THE RESIDENTIAL NATURAL GAS MARKET BECAUSE IT OFFERS THE ONLY PROGRAM THAT PASSES THE BENEFITS OF STORAGE ON TO ITS CUSTOMERS AND ITS PRICES HAVE CONSISTENTLY BEEN LOWER THAN OTHER GAS SUPPLIERS IN THE MARKETPLACE.

Santanna currently occupies an important role in the residential natural gas marketplace. Santanna is the only gas supplier that allows its customers to buy gas during the summer when rates are historically lower and store it for use during the winter, when rates are historically higher.³³ Gatlin Rebuttal, p. 33; Tr. at 97-98, 105 (Gatlin). The aspect of Santanna's program alone, using a historical perspective, provides a savings benefit to Santanna's customers. Gatlin Rebuttal, pp. 8, 33 and Ex. 1.20. Gatlin's testimony that Santanna's execution of the storage program is more beneficial to customers than the usage-billed programs offered by other gas suppliers was unrefuted. Furthermore, Santanna has consistently charged lower rates than Nicor, Peoples and other alternative gas suppliers. *Id.* at 8, 33; See *Citizens Utility Board Request for an Investigation Into the Current Structure of the Nicor Customer Select Pilot Program*, Consolidated Docket Nos. 00-0620 and 00-0621, 2001 Ill. PUC Lexis 753, *7 and *30 (July 5, 2001) (noting the importance of competition in the residential natural gas market and the ability of alternative gas suppliers to offer different services, options and incentives).

The Commission should not deny the benefits of Santanna's program to natural consumers. Additionally, if certification is denied, the choices of tens of thousands of gas customers who chose Santanna will be negated.³⁴ Howard Direct, p. 5. Additionally, the marketplace will then be left only with suppliers keeping storage benefits for themselves.

³³ Neither the Staff, the Attorney General nor CUB offered evidence to the contrary.

³⁴ As of August 22, 2002, Santanna had 38,027 residential customers. Gatlin Rebuttal, p. 4.

VI. THE COMMISSION SHOULD NOT PENALIZE SANTANNA FOR OFFERING SERVICE WITHIN THE 180-DAY GRACE PERIOD.

Relying exclusively on events that occurred in the early days of the AGSL, the Opposing Parties contend that Santanna should be denied a certificate of service authority. If that position is lent credence, it would not only fail to give effect to the 180-day grace period, but it would, in fact, penalize Santanna for operating as an alternative gas supplier and working out the kinks in its program during that period. Ironically, on the other hand, the Commission could certify a putative alternative gas supplier that has never sold a therm of gas, presumably without opposition. Gatlin Rebuttal, p. 31. Santanna did not shy away from providing an unmistakably competitive program during the grace period. *Id.* at 33. It should not be penalized for its early entry into the market, even if its experience was not perfect. *Id.* at p. 31. Such a penalty would defy the purpose of the grace period.

Conclusion

For the foregoing reasons, the Commission should grant a certificate of service authority to Santanna.

SANTANNA NATURAL GAS CORPORATION,

By: _____
Karl G. Leinberger, One Of Its Attorneys

Dated: September 20, 2002

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